

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE
Employer

and

Case 5-UC-377

AMERICAN POSTAL WORKERS UNION,
AFL-CIO, CLC
Union-Petitioner

DECISION AND ORDER

The American Postal Workers Union (herein Petitioner or APWU) filed the instant unit clarification petition under Section 102.60(b) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, and Section 101.17 of the Board's Statements of Procedures. The Union seeks to include the position of "Small Business Specialist (EAS-16)" (hereinafter Small Business Specialist) in the nationwide bargaining unit.¹

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Based on my investigation and the following facts, I dismiss the Union's petition for the reasons set forth below.

I. FACTUAL BACKGROUND²

Article 1 of the extant 2000-2003 contract provides for Union recognition, principally in clerk, motor vehicle and maintenance crafts. It also specifies employee groups and facilities excluded, including employees who work in facilities which are not engaged in customer service and mail processing. There is no claim that any specific exclusion covers the Small Business Specialist.³

There are 85 Postal Districts that report to nine Areas. Each Area has a Marketing Department, headed by an "Area Marketing Manager (PCES-1)".⁴ A Manager of Retail, a Manager of Customer Service, and a Manager of Small Business Development, all of whom are in the EAS series, report to the Area Marketing Manager. Each District also

¹ All non-bargaining unit positions, with the exception of high-ranking executives, are placed in the Executive and Administrative Service (EAS) series.

² The parties provided position papers and documents, and supplemental position statements and documents in support of their respective positions.

³ A copy of Article 1 is attached. In light of the disposition herein, I need not resolve whether the Small Business Specialist falls under the contractual exclusion for managerial employees or Area Offices.

⁴ PCES stands for Postal Career Executive Service.

has a Marketing Department headed by a Manager of Marketing. Reporting to the District Marketing Manager are a Manager of Retail, a Manager of Consumer Affairs, a Manager of Business Mail Entry, and a Small Business Specialist, all of whom are in the EAS series.

The Small Business Specialist was created in 2000 as part of a reorganization of the sales and marketing functions. Prior to 2000, the Area Marketing Department was responsible for sales and marketing. After the reorganization, the sales function initially was removed from the Area level, but it now has been reinstated. The determination of whether to place an individual in the Small Business Specialist position was made by each District. Since 2000, 24 of the 85 Districts have created a Small Business Specialists position to perform traditional marketing functions focused on the small business customer. The other 61 Districts continue to market to small businesses by utilizing the Managers of Retail and Consumer Affairs and their respective EAS non-bargaining unit marketing staff to perform small business functions. In other words, these 61 Districts continue to market to small businesses within the overall Marketing Department structure by sharing small business work among a number of marketing employees under the direction of the Managers of Retail and Consumer Affairs.

Generally, the Small Business Specialist participates in the planning, development and execution of small business programs to increase customer acceptance, revenue contribution, and customer loyalty. Specifically, the Small Business Specialists develop and implement training and advertising programs for small business customers and strategies to meet small business revenue goals. In addition, they review small business trends, provide econometric forecasting and other services, and make recommendations to improve small business customer satisfaction and loyalty to the District Marketing Department. The investigation establishes that EAS non-bargaining unit employees in the Marketing Department have traditionally performed marketing functions to large and small business customers, including the work performed by the Small Business Specialist.⁵

⁵ In October 1997, APWU filed a unit clarification petition in Case 5-UC-353 seeking to include approximately 250 EAS positions in the bargaining unit based on the claim that these positions were not managerial, supervisory, or professional. A non-Board agreement was reached in which the APWU withdrew the petition, including any claim to positions such as the “Retail Marketing Specialist (EAS-16)” and “Retail Specialist (EAS-16)”. The APWU advances no claim in this case that anyone from the Marketing Department performing marketing functions akin to those performed by the Small Business Specialist has been in the bargaining unit.

II. POSITIONS OF THE PARTIES

A. The APWU's Position

While the Union concedes that properly classified EAS positions typically fall within unit exclusions, the Union argues that the Small Business Specialist does not fall within any contractual exclusions. The Union further argues that all positions in customer service and mail processing facilities that are not specifically excluded under the contractual recognition clause must be included in the bargaining unit. The Union claims that the Small Business Specialist performs work comparable to the APWU clerk craft in customer service facilities. Therefore, the Union argues that unit clarification is appropriate under the rebuttable presumption standard used for determining unit placement issues involving functionally described units as set forth in The Sun, 329 NLRB 854 (1999).

B. The Postal Service's Position

The Postal Service argues that the Small Business Specialist, although arguably a new position in twenty-four of sixty-one Districts, is simply performing traditional marketing functions that are focused on the small business owner and that have been historically excluded from APWU jurisdiction. The Postal Service highlights the fact that only a "small" number of Districts have filled the position, and that most District Marketing Departments continue to service small businesses within the existing structure rather than by establishing a separate position. Thus, the fact that postal management has decided to pay particular attention to the small business market, which is part of the overall historically excluded marketing department, cannot convert historical non-bargaining unit work to unit work, the Postal Service argues. The Postal Service asserts that a contrary holding would make the Small Business Specialist "an island in a sea of non-bargaining EAS positions."

III. ANALYSIS

For the reasons explained below, I find that the instant unit clarification petition concerns a newly created position that performs work which has always been performed by employees in the Marketing Department, a group which historically has been excluded from the unit. I find that no hearing is necessary because application of Board law to certain undisputed facts warrants dismissal of the petition under historical department exclusion principles. Accordingly, I dismiss the petition.

The Board's express authority under Section 9(c)(1) to issue certifications includes the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, Section 102.60(b) of the Board's Rules and Regulations, Series 8, provides that a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists.

The Board explained the purpose of unit clarification proceedings in Union Electric Co., 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category — excluded or included — that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

It is well established that the Board will not entertain a unit clarification petition seeking to accrete a historically excluded classification into the unit, unless the classification has undergone recent substantial changes. Bethlehem Steel Corp., 329 NLRB 243, 244 (1999). Rather, a petition seeking to include a classification that historically has been excluded from the unit raises a question of representation, which can only be resolved through an election, or based on majority status. Boston Cutting Die Co., 258 NLRB 771 (1981). As stated in Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991), enfd. Teamsters National UPS Negotiating Committee v. NLRB, 17 F.3d 1518 (D.C. Cir. 1994):

The limitations on accretion ... require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

(emphasis in original). Consequently, when employees have not been included in the unit for some time and the union has made no attempt to include the position in the unit, the position is historically outside the unit, and the union has waived its right to a unit clarification proceeding. Sunar Hauserman, 273 NLRB 1176 (1984); Plough, Inc., 203 NLRB 818 (1973). Accord: ATS Acquisition Corp., 321 NLRB 712 (1996); Robert Wood Johnson University Hospital. Similarly, unit clarification is not appropriate for inclusion of positions in reorganized departments that perform work which historically has been performed by employees in departments excluded from the bargaining unit. American Machine & Foundry Co., 152 NLRB 561 (1965).

The union in American Machine & Foundry Co. timely moved to clarify the unit shortly after the most recent contract was executed. The union claimed that certain post-

certification administrative changes unilaterally made by the employer altered preexisting departmental arrangements and warranted inclusion of 31 employees working in affected departments in the bargaining unit. 152 NLRB at 561. In particular, three of the employees whom the union sought to add to the unit worked in the newly established program control room. Prior to the administrative changes, however, the program control room work was performed by and staffed by employees in the engineering department, a group historically excluded from the unit. Therefore, the Board rejected the motion to clarify the unit to include the employees performing work in the program control room. The union also sought to include four employees in the recently reorganized estimating and pricing sub-department. Prior to the reorganization, bargaining unit employees had always performed the estimating function, and they continued to perform this function after the reorganization. Employees in the engineering department, however, had always performed the pricing function. The Board found that the pricing work being performed in the estimating and pricing sub-department after the reorganization was work that had always been done by engineering department employees, who had been historically excluded from the unit. Accordingly, the Board concluded, that in these circumstances, the disputed classifications could not be added to the existing unit by way of a unit clarification procedure. 152 NLRB at 562, 564.

Applying these principles in this case, I find that the Small Business Specialist is a newly created classification whose unit placement is governed by historical department exclusion principles. The instant unit clarification petition seeks inclusion of the Small Business Specialist, a position whose work has always been performed by employees in the Marketing Department, a group historically excluded from the unit. Accordingly, the historical department exclusion principle precludes unit clarification. American Machine & Foundry Co.

The APWU relies on The Sun, 329 NLRB 854 (1999). That case is inapposite. It concerned the removal of bargaining unit work through creation of new positions that clearly involved the performance of unit work. Here, by contrast, there has been no transfer of unit work to non-unit employees and no removal of positions from the bargaining unit. Rather, a new position was created during the 2000 reorganization to perform historically excluded, non-bargaining unit work.⁶ Accordingly, I dismiss the petition under the above-cited historical department exclusion principle.⁷

⁶ Thus, this case is also clearly distinguishable from recent Board cases that have clarified existing units to include “newly created positions” that perform the same basic functions as those historically performed by members of the bargaining unit. See Developmental Disabilities Institute, Inc., 334 NLRB No. 143 (2001); Premcor, Inc., 333 NLRB No. 164 (2001). Here, unit employees historically have not performed the marketing functions performed by the Small Business Specialist.

⁷ I note that the Union may seek to represent these employees through a representation petition, which affords the employees an opportunity to choose whether or not to be represented in the existing unit. In this way, postal employees, who are barred from striking, will be given the opportunity to decide important statutory issues for themselves. See United States Postal Service v. NLRB, 969 F.2d 1064, 1068 fn. 3 (D.C. Cir. 1992).

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it, hereby, is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **MARCH 21, 2003**.

Dated: **MARCH 7, 2003**
At Baltimore, Maryland

/s/ WAYNE R. GOLD
Regional Director, Region 5



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